IN THE HIGH COURTOF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 174 OF 1991

NANDU KALURAM SHINDE
AGE 24 YRS, OCCU.EDUCATION
RESIDING AT KUMBHARWADA, GOVANE
TALIM, BHOSARI, PUNE. ... APPELLANT
[ORIG. ACCU. NO.1.]

VS.

THE STATE OF MAHARASHTRA ... RESPONDENT
[ORIG.COMPLAINANT]

MR. S.A.INGAWALA I/B. S.S.NIGURDKAR WITH K.R.BHOONSALE
FOR THE APPELLANT-ACCUSED.
MS. S.V.GAJARE APP FOR THE STATE- RSPONDENT.

CORAM : S.K.SHAH, J.
DATE OF RESERVING THE JUDGEMENT : January 18, 2006.
DATE OF PRONOUNCEMENT OF JUDGMENT: January 18, 2006.

ORAL JUDGMENT

1. The Appellant-Original accused No.1 has filed this

Appeal against the Order of conviction and sentence passed against him by the 5th Additional Sessions Judge, Pune, in Sessions Case No. 327 of 1990, whereby the appellant was convicted of the offence punishable under Section 304 Part II of the Indian Penal Code and sentenced to undergo RI for seven years and to pay a fine of Rs. 1000/-, in default of payment of fine, to undergo simple imprisonment for six months.

2. The appellant-accused No.1. was tried alongwith three accused persons. The other three accused persons, accused Nos. 2 to 4 were acquitted of all the charges. The trial was for offence punishable under Section 302 of the Indian Penal Code, however, the appellant- accused No.1 was acquitted of the same and the aforesaid Order of conviction and sentence was passed.

3. Briefly stated, the prosecution story was that about 3/4 days prior to the incident, which took place on 31.3.1989, there was exchange of words between the appellant and the deceased. It is alleged by the prosecution that it was because of the said quarrel, the appellant- accused No.1 had a grudge against the deceased Sanjay Landge.

4. On the day of the incident, i.e. on 31.3.1989, at

about 2.00 p.m., the prosecution alleged, the deceased Sanjay Landge, his friends Sanjay Tukaram Gund - PW 2 and Nathu Sakharam Mhaske- PW 3, were sitting chitchatting in the lane, behind Millan Bakery at Bhosari. It is alleged that the appellant came there on motor-bike alongwith other three accused, who were in rickshaw. As they came near the deceased, the appellant was holding sharp weapon, which is used for cutting sugar-cane. The appellant pointed out that weapon towards the deceased saying his companions that it was the deceased, who had abused him. The appellant went near the deceased with the said weapon and assaulted him by means of the said weapon on his back. As a result of the assault, the deceased was injured on ;his back and he fell down. Thereafter all the accused, including the appellant ran away. It is alleged that the two friends of the deceased, Mhaske and Gund came to the spot. The deceased sustained bleeding injury. They immediately removed him to Bhosari Police Chowki in rickshaw. From there to Sassoon Hospital with Yadi given by the police. From Sassoon Hospital they alongwith the members of the family of the deceased, removed the deceased to Ruby Hospital at Pune. Eventually, the deceased was admitted in the hospital for seven days, after that, he expired.

5. Baban Zambre (PW 10), the police havildar was

present at the police chowki at Bhosari at about 2.45 p.m. The deceased and his two friends Pw.-2 Sanjay Gund and PW 3 Mhaske had gone to the police chowki by rickshaw. Baban Zambare found the deceased having bleeding injury on his;back. Therefore, he send him to Sassoon Hospital with Yadi (Exhibit 39). According to this witness, the deceased told him that he was injured by sharp weapon. Same thing was recorded in Yadi- Exhibit 39. Then he went to Sassoon Hospital with a letter and, therefrom to Ruby Hospital and at Ruby hospital, he found the deceased to be conscious, therefore, he recorded the statement of deceased and obtained his signature thereon, which was taken as First Information Report (Exhibit 40). He sent that FIR alongwith his report, exhibit 41, to Bhosari Police Station for registration of the offence. Eventually, the offence came to be registered vide C.R. No. 31 of 1989. Havildar Zambre - PW 10, himself was directed to investigate the offence. Accordingly, he went to the spot of the occurrence and prepared the spot panchanama (Exhibit 31). From the spot, he seized the long knife (Article 3), which was the weapon of assault. Then he seized the shirt and banian of the deceased, under panchanama Exhibit 17 (Article- 1). It is, thereafter, he recorded the statements of the two witnesses, Sanjay Gund- PW 2 ad Mhaske - PW 3. He also recorded the statement of Kailas Gavane.

. It appears that the further investigation was carried out by Police Inspector Patil, PW 11, during which he verified the FIR. By going to the hospital interrogated the injured Sanjay (deceased). He recorded the Statement of Mohammed Ansari - PW 6. After the injured expired on 7.4.1989, he drew inquest panchanama (Exhibit 16) and sent the dead body for post-mortem examination. The post-mortem examination was carried out in Sassoon Hospital.

. It further appears that PI V.G.Vhotkar - PW 12 took up the investigation on 15.4.1989 and had sent the knife and the clothes of the deceased to Chemical Analyser. The Report of the C.A indicates that the knife was stained with human blood, but the group of the blood could not be determined.

. Thus, after completing the investigation, the charge- sheet came to be filed on 3.7.1989 against all the four accused persons. The case came to be committed to the Court of Sessions.

6. A charge came to be framed against all the accused. All the accused pleaded not guilty to the charges levelled against them. Their defence was of total

denial.

7. At the trial, the evidence of two eye witnesses, namely, Sanjay Gund - PW. 2 and Nathu Mhaske - PW 3 was recorded. The evidence of Mohammed Ansari - PW 6, who had gone to the spot soon after the occurrence of the incident. Then the evidence of Dr. Asmit Bhave - PW 7 from Ruby hospital was recorded. The evidence of Dr. S.D.Nandkar - PW. 8 was recorded. The evidence of M.M.Jawale - PW. 9, the rickshaw driver, was recorded. But he turned hostile to the case of the prosecution. As per the allegations of the prosecution, it is by his rickshaw the other three accused had come to the spot. Evidence of Zambre - PW 10 police havildar, who recorded the FIR and carried out the part of investigation was recorded. The evidence of Patil -k PW 11, who is the Investigation Officer and PI Vhotkar - PW 12, who sent the articles to the chemical analyser, are recorded.

8. Having considered the evidence, the learned Sessions Judge found the appellant guilty of the offence punishable under Section 304 - Part II of the Indian Penal Code and convicted him, as aforesaid.

9. With the assistance of learned defence Counsel and the learned Public Prosecutor, I have gone through the

evidence of the witnesses. The material evidence is of the two eye witnesses, namely, Sanjay Gund -PW 2 and Mhaske - PW 3. The evidence of Sanjay Gund -PW 2 is that at about 2.00 p.m. on 31.3.1989, he himself, deceased and Nathu Mhaske - PW 3 were sitting chitchatting behind Millan Bakery, which is situated at Landewadi chowk at Bhosari. He further states that at that time, all the four accused came there in rickshaw and the appellant-accused No.1 was holding one weapon, used for cutting sugar-cane. He further states that all the accused said that deceased Sanjay was the person, who abused and he should be beaten. At that time, the appellant - accused No.1 went near the deceased and assaulted the deceased by means of sharp weapon, on his back. As a result of the assault, the deceased fell down. It is thereafter that he himself and other witnesses Nathu Mhaske- PW 3 ran away from the spot out of fear. Thereafter, all the accused also ran away from the spot. It is, thereafter that he himself and Nathu Mhaske - PW 3 went back to the spot and took injured Sanjay Landge to Bhosari Police Chowki. He specifically states that he himself and
Nathu Mhaske - PW 3 had given the complaint, the same was recorded. Then they took the injured Sanjay to Sassoon Hospital alongwith Yadi and from Sassoon hospital to Ruby hospital, alongwith the family members of the deceased.

10. The evidence of Nathu Mhaske - PW 3 is to the effect that all of them i.e. the deceased, Sanjay Gund and he himself, were sitting behind Millan Bakery and they were chitchatting. The appellant alongwith his other three friends came there. He was not knowing other three friends of the appellant- accused NO.1. The appellant was

having sharp weapon, used for cutting sugar cane. The appellant said his friends that Sanjay Landge (deceased) was the same person and he should be beaten. Then the appellant assaulted the deceased with ’Chopper’ on his back on the upper portion, due to which the deceased sustained injury and he fell down. The blood was oozing from his injury. Thereafter, out of fear, he himself and the other witness Sanjay Gund - PW 2 ran away from the spot. After the accused ran away from the spot, they again went back to the spot and removed the injured Sanjay Landge to police chowki, Bhosari and then he narrates the same incident about having removed the deceased to Sassoon Hospital and from there to Ruby hospital. He also affirms that both, he himself and Sanjay Gund - PW 2, narrated the incident to the police at the Police Chowki Bhosari.

. Thus, both these witnesses claim to be the eye witnesses to the incident. Their evidence has been seriously challenged by the defence.

11. In the cors-examination, Nathu Mhaske - PW 3 admits that when they saw the accused persons coming towards them, with sharp weapons in their hands, all of them had started running away. This falsifies the version of both the witnesses that they ran away from the spot after the appellant assaulted the deceased with the weapon in his hand. Both these witnesses have clearly stated in their evidence that they had narrated the incident to the police at Bhosari Police Chowki and the same was recorded and their signatures were obtained thereon.
However, these statements are not produced by the prosecution.

. PW 10 Baban Zambre, police havildar specifically stated that he had not recorded their statements but had only given Yadi to them. The witness specifically states that he recorded the statements of these two witnesses after he drew the spot panchanama and the panchanama of seizure of the clothes of the deceased (Exhibit 17). In cross-examination Baban Zambre - PW 10 admits that Sanjay Gund -PW 2 had told him that somebody assaulted Sanjay Landge (deceased) and accordingly he had mentioned the same thing in the Yadi (Exhibit 39). Yadi Exhibit 39 specifically mentions that the deceased was assaulted by somebody. This mentioning in the Yadi and admitted fact

that the incident was narrated by both these eye witnesses to the police havildar Baban Zambre - PW 10, create serious doubt about the presence of these two witnesses at the time of incident. There is also material contradiction in the evidence of these two witnesses, to the effect that they had seen the alleged assault made by the appellant on the deceased.

. It is pertinent to note that both these eye witnesses were knowing the appellant very well since prior
to the incident. If this was true and if it is a matter of fact that they had narrated the incident to the PW 10 -Baban Zambre, it is highly improbable that they did not disclose the name of the appellant at the time of Yadi. It is further improbable that if they had disclosed the name of the appellant being assailant, the same name would have been mentioned in the Yadi (Exhibit 39). However, Baban Zambre - PW 10 has categorically admitted in cross-examination that what was disclosed to him by the witnesses was that somebody had assaulted the deceased and accordingly he had mentioned it in the Yadi.

12. The learned Trial Judge has brushed aside this discrepancy merely having said that it does not decide the fate of the case. However, that reasoning adopted by the

learned Trial Judge does not appear to be proper. In fact the aforesaid discrepancy goes to the root of the matter and creates serious doubt about the presence of the two eye witnesses at the time of the occurrence of the incident.

13. Witness Mohammed Ansari - PW 6 has stated that having heard the big noise, he rushed to the lane from his bakery and found that the deceased was lying in the gutter with injury. What is pertinent to be noted is that he did not see these two eye witnesses anywhere present around the spot. However, he had seen some persons running away from the spot with weapons. Therefore, this evidence of PW 6 is of no help to the prosecution.

14. The weapon was seized from the spot. It is, however, pertinent to note that Mohammed Ansari - PW 6 does not speak about the weapon lying on the spot. The two witnesses, who claimed themselves to be the eye witnesses, also do not speak of having seen the weapon lying on the spot. Normally, when they returned to the spot, where the deceased was lying as alleged, they would have seen the weapon lying on the spot. The description of the weapon has been given in the panchanama at Exhibit 31, makes it clear that - the weapon was quite large and

could not have escaped the attention of these two witnesses. The description of the weapon shows that it was 6.1/2 inches long black lather wrapped on it, having 12
inch long bled, which was 1.1/2 inch wide and sharp on both sides. It also does not tally with the description of the wound injury described as 4" x 1". If the width of the bled was 1.1/2 inch, it would not have produced the injury of 1 inch only. Therefore, it creates a doubt whether the weapon, which is article No.3 before the Court, was the same weapon used in the
commission of the offence.

15. It is alleged that PW 10 Zambre had recorded the statement of the deceased, which was treated as FIR. In the FIR the deceased has given the incident in detail. What is pertinent to be noted is that the name of the appellant was not disclosed by the deceased to Zambre PW 10 at the police chowki . PW. 10 Zambre has admitted
that he met the deceased at chowki,
and if that was so, he would have definitely inquired about the name of the appellant (accused) but that was not made or even if it is made, the disclosure of the name of the appellant was not done by the deceased. This is an admitted position that the deceased was then conscious. The FIR is not a substantive piece of evidence. The

deceased died seven days later. Therefore, it is also not a dying declaration. Therefore, the FIR would not be of much importance.

16. Under these circumstances, the evidence of the two eye witnesses is not reliable when they stated that they had seen the assault. Their evidence also does not find any corroboration from any independent witness. Their evidence is contrary to the evidence of Zambre - PW 10 police havildar. Under the circumstances, there is serious doubt about the case of the prosecution. It, however, appears to be a matter of fact that the deceased was assaulted on that day. However, from the evidence of Mohammed Ansari, it appears that deceased was assulted by some unknown persons.

. Under the circumstances, the Order of conviction and sentence, passed against the appellant is erroneous and cannot be maintained. Hence, the Order :-

O R D E R

1. The appeal is hereby allowed.

2. The Order of conviction and sentence, passed against the appellant-accused No.1 for

offence punishable under Section 304 Part- II of the Indian Penal Code, is hereby set aside. The appellant- accused is acquitted thereof.

3. The bail bond of the appellant-accused No.1 stand cancelled.

....

[S.K.SHAH, J.]

Mumbai,
Date : 19/1/2006

To,
The Dy. Registrar,
Protocol Department,
High Court, Mumbai.

Respected Sir,

As directed by His Lordship Shri Justice S.K.Shah, I have

to inform you that His Lordship requires the Suite in "Vidhi" Building from 4.2.2006 to 12.2.2006 for his guests. Preferably the suite adjacent to the Hall be reserved in the name of His Lordship.

Yours faithfully,

[D.V.Godbole]

Per.Secretary to S.K.Shah,J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 174 of 1991

Date of Decision : January 18, 2006.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see

the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the Judgment should be sent to Nagpur, Goa and Aurangabad office?

*****